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Via Email

To: Commission Staff

Cc: Jonathon Marshalian, Esq.
Fred Miri
Stephen Murray
David Rudd, Esq.

From: Joseph D. Murphy

Re: Response of Gallatin River Communications, LLC

Date: June 4, 2007

Gallatin River Communications, LLC ("GRC") reviewed the materials circulated by BitWise on Wednesday, May 30 and has the following comments and observations.

At Issue

The only issue here is whether, under the circumstances, BitWise is obligated under the October 3, 2006 Interconnection Agreement between the parties to provide a letter of credit as an assurance of payment in response to GRC's March 7, 2007 demand. According to Section 5.2 of the Interconnection Agreement:

5.2 Assurance of payment of charges may be requested by GRC if CLEC (a) prior to the Effective Date, has failed to timely pay a bill rendered to CLEC by GRC or its Affiliates, (b) on or after the Effective Date, fails to timely pay a bill rendered to CLEC by GRC or its Affiliates, . . .

The materials submitted by both GRC and BitWise demonstrate that BitWise has repeatedly failed to make timely payments on GRC bills. For that reason, by letter dated March 7, 2007, GRC demanded, pursuant to Section 5.3 of the Interconnection Agreement, that

BitWise obtain for GRC's benefit an irrevocable letter of credit in the amount of \$22,000, which would be equivalent to approximately two months worth of service at the current level.

BitWise initially ignored the request and then, subsequently, repeatedly refused GRC's request. By its "Default" letter dated May 9, 2007, GRC notified BitWise that it would terminate the Interconnection Agreement because BitWise was consistently delinquent in its payments and had ignored the deposit requirement. On May 24, BitWise made a payment of \$28,366.47 making its account current, which to the best of GRC's knowledge, is the first time BitWise has ever been current. But, despite its once again late payment, BitWise has steadfastly refused to honor the deposit requirement, most recently during the joint meeting between the parties and Commission Staff on May 30, 2007. Therefore, it is GRC's position that the Interconnection Agreement will be terminated pursuant to its default terms on June 25, 2007 (GRC unilaterally added a week to its notice to facilitate the informal mediation with Commission Staff).

What is not at issue within the scope of the Default letter is whether GRC owes reciprocal compensation to BitWise. GRC will pay for reciprocal compensation traffic that is subject to the Agreement. On approximately May 10, BitWise issued five invoices, at one time, to GRC covering the period December 2006 Through April 2007.¹ GRC is currently analyzing them because the volume of traffic originated by BitWise appears excessive in relation to its customer base.² Any traffic that is reciprocal compensation within the terms of the Agreement will be paid on a net 30 day basis. Pursuant to the terms of the Interconnection Agreement, GRC will also issue a corresponding reciprocal compensation invoice to BitWise, representing the reciprocal compensation traffic from GRC to BitWise.

What is also not in dispute within the scope of the Default letter is the appropriate rate for the DS1 ("promotional" (the new product)) circuits. The new product DS-1 circuits dispute reached a conclusion in March of this year, with two credits totaling approximately \$11,000 being made to the BitWise account. These credits were the difference between the tariff price of similar circuits and the actual price of the new product as provided for in the new interconnect agreement. Nonetheless, a short understanding of this new product pricing dispute is necessary to understand the bulk of BitWise's asserted disputes. In approximately April of 2006, BitWise asked to order four DS1 circuits to support service it had contracted with for four prospective customers. GRC informed BitWise that the product it was ordering was not available under BitWise's then-current interconnection agreement. As an incentive to move ahead with the negotiation of a new interconnection agreement, GRC told BitWise that, if it ordered the four circuits out of GRC's tariff at the higher, standard tariff rate, GRC would include an available "promotional rate" in the resulting interconnection agreement for the new product and would,

¹ BitWise now claims that the reciprocal compensation invoices were sent in due course and points to an email it sent to GRC in December 2006. As GRC advised BitWise at that time, GRC could not open the relevant email attachment and requested a formal invoice. No invoices came until May 10, 2007 and even BitWise does not contend that it sent any invoices between December 2006 and May 2007.

² Upon receipt of the reciprocal compensation invoices, GRC requested tandem summary reports from AT&T Illinois through which BitWise connects to GRC. While BitWise reported originating traffic to GRC in the amounts of 83902, 85221, 89337 and 98896 minutes per month for each of the months from January through April 2007, respectively, the attached tandem summaries reports only 405, 341, 289 and 309 minutes per month for each of those months respectively. GRC is still investigating the discrepancy.

after that agreement was approved by the Illinois Commission, credit the difference in those rates retroactively to the order date for those four circuits. Any other circuits, beyond the original four (the promotional circuits) would be re-priced only as of the approval date of the new Interconnection Agreement. The four-circuit number was later reduced to three when one of BitWise's four customers withdrew from service with BitWise.

Despite a clear explanation of this promotional proposal, BitWise disputed the tariff rate invoices repeatedly between the time the current Interconnection Agreement was negotiated in early October 2006 and the time the Commission approved it on December 20, 2006. On January 16, 2007, GRC issued a credit for the three DS1 circuits, discussed herein. BitWise, however, ordered six additional DS1 circuits before the Commission's approval date and then objected when the pricing for those circuits was not retroactively reduced to the promotional rate. Ultimately, in March of 2007, GRC agreed to retroactively rate all nine DS1 circuits and, on March 21, 2007, GRC issued an additional credit related to those other six circuits. In the interim, Stephen Murray (Director of Regulatory Affairs for GRC and BitWise's contact) had developed several spread sheets depicting the difference between the two rates and the anticipated credit on a monthly basis to which BitWise was eligible under the expanded proposal, and these spread sheets were forwarded on to BitWise, commencing in September of 2006. This was done so that BitWise would have an approximation of what could be reasonably disputed on a monthly basis. It is significant to note that, ultimately, BitWise received the pricing it demanded on **all of those circuits** from the date of their installations. Therefore, there were no properly disputed amounts that were not ultimately credited to BitWise. The credit was not completed until March of 2007 because, even-though the Interconnection agreement had been approved, GRC's parent, Madison River, had not yet updated the GRC billing system to accommodate the rate structure of the new DS-1 circuit products. Nevertheless, GRC provided the credit through to the point in time until the billing systems were properly upgraded.

Finally, what is not in dispute within the scope of this informal case before the ICC, is BitWise's May 30, 2007 (meeting) allegation that GRC imposed interest and late payment penalties. GRC does not impose penalties or interest on past due amounts. GRC does impose late payment fees, as provided for in the Interconnection agreement and ICC rules, and in this instance GRC credited all late fees imposed to BitWise. Moreover, other than asserting an issue, BitWise has not pointed out what interest or fees it might contest and has not identified any specific amounts into the formal dispute process.

Returning to the single issue in dispute – whether GRC's Default letter and deposit demand is supported by BitWise's failure to remain current on its invoices -- BitWise produced on May 30 a spreadsheet and a collection of email messages. GRC will respond to each of these below, showing that neither the spreadsheet nor the email messages, support BitWise's contention that it timely paid all undisputed amounts. Rather, BitWise's collection of email messages submitted to the ICC and GRC prove quite the opposite. GRC will then explain the termination procedure pursuant to the Default that it intends to follow under the Interconnection Agreement and the resulting impact on customers.

The BitWise Spreadsheet

The spreadsheet BitWise provided on May 30 ("BitWise Spreadsheet"), purporting to show invoices and payments between BitWise and GRC, demonstrates that there is no dispute between the parties regarding the amount or timing of any invoices, the amount or timing of any payments or amount or timing of any grant of adjustments to BitWise. GRC is submitting with this memorandum its own spreadsheet ("GRC Spreadsheet"). With the correction of a few formulas on the BitWise Spreadsheet,³ both spreadsheets are similarly in agreement as to the total amounts billed by GRC, paid by BitWise and adjusted by GRC.

Unfortunately, the BitWise Spreadsheet makes no attempt to identify the timing of any payments and therefore is generally unhelpful regarding the central issue (late payment) here. The GRC Spreadsheet shows the timing of all invoices payments and adjustments and consequently shows that BitWise was chronically behind in its payments (on average, approximately \$13,000). The GRC Spreadsheet shows these entries in three alternatives to allow at least three different ways to analyze that history. While GRC does not believe each of the three histories is equally valid, all three demonstrate BitWise's chronic payment delinquencies.

First, the gray columns compare actual invoice dates against actual payment dates. Comparing the gray Invoice Date column against the BitWise payment column results in the average balance due shown in second gray column. The third gray column shows the average balance due by month. While it is true that the initial invoice in November of 2005 was not due for thirty days and thus not actually delinquent, BitWise's first late payment and virtually every subsequent entry shows that BitWise never caught up with its invoices and was therefore constantly in arrears.

The light blue columns respond to BitWise's claim that the invoices reflected net 30 payment terms so that BitWise would not be in arrears until an invoice was 30 days past issuance. As an accommodation to this tack, the first blue column assumes that the full amount of each invoice became due thirty days after its issuance. The second blue column reflects the resulting balances due and the third blue column reflects the average balance due on a monthly basis. Even fully accepting BitWise's argument about the timing of money owed, this third blue column demonstrates BitWise was still chronically past due in its payments. Moreover, given that virtually every invoice after the first one included some amount of past due payments, which continued to be overdue without the passage of the net thirty days, the best that can be said for BitWise is that its arrearages were somewhere between the gray and the blue numbers. Determining exactly where between those numbers would be a burdensome exercise, which would not materially change the outcome of this issue; that BitWise was chronically delinquent in its payments to GRC.

The yellow columns reflect the impact of the resolution of the DSI issue. Based on a spreadsheet that Mr. Murray provided to Mr. Schuler on approximately November 30, 2006 and subsequent updates/revisions were made as time passed (a copy of which is included as the

³ A review of the formulas in the BitWise spreadsheet shows that they do not include all relevant rows in the column totals at the bottom.

second tab to the GRC Spreadsheet), the yellow columns impute the credit ultimately granted through adjustments on January 16 and March 27, 2007 to the invoice due dates with which they correspond. Thus, the first yellow column shows an imputed credit (imputed because it was not actually granted until a subsequent invoice) corresponding to the month in which the charge originally would have come due. It significant to note here, that because GRC ultimately agreed to price the DS1 circuits according to BitWise's demand, the imputed credit was the full amount that BitWise ever could have legitimately refused to pay, even so, still BitWise was delinquent.

As with the gray and blue columns, the second yellow column shows the resulting balances due and the third yellow column reflects the resulting average balance due on a monthly basis. While GRC does not believe that the yellow columns reflect a true rendering of BitWise's arrearages (GRC believes they were higher), they do show an *absolute best case scenario* for BitWise, assuming that all invoices became fully due on the thirtieth day after issuance and that BitWise was entitled to impute as a disputed amount all amounts that it was ultimately credited. As the third yellow column shows, BitWise was still chronically behind in its payments.

In summary, this spreadsheet analysis shows that BitWise failed to timely pay bills rendered by GRC and thus justifies GRC's demand for a letter of credit assuring payment.

The BitWise Emails

Contrary to the representation made to the Commission Staff by BitWise on May 30, neither the BitWise Spreadsheet nor the email messages show that BitWise was current in its payments or that it consistently paid the undisputed amounts of its invoices in a timely manner. The collection of emails circulated to Staff and GRC are clearly a cherry-picked sampling collected by BitWise to put the best face on its position. They do not purport to be complete nor are they. Nonetheless, without piling additional paper on the Commission Staff, the BitWise emails clearly undermine BitWise's claims.

For example, in one of the emails, dated September 7, 2006, from Fred Miri (president of GRC) to Stephen Murray (Director of Regulatory Affairs for GRC) and Mr. Marashlian, counsel to BitWise, Mr. Miri provides a clear explanation as to why GRC agreed to provide a credit to BitWise for four DS1 (promotional) circuits as part of the negotiation of a new (now the current) Interconnection Agreement. Mr. Miri explained why the circuits would have to be bought and invoiced initially from GRC's tariffs, because the new product carrying these rate elements was not yet developed and added to GRC's billing systems. Mr. Miri also explained that the promised credit for the difference between the tariff rate and the new Interconnection Agreement (promotional circuit) rate would not and could not be applied until the new Interconnection Agreement was approved by the Commission. Mr. Miri also explained that the credit would apply only to the four circuits Mr. Schuler had already sold to customers (which became three circuits when one of the customers backed out). All other circuits would be entitled to the new rate only from the approval of the new Interconnection Agreement. The new Interconnection Agreement was ultimately approved by the Commission on December 20, 2006. Despite that explanation and the approval date, there are several emails subsequent to Mr. Miri's September 7 explanation, predating Commission's December 20 approval, objecting to the GRC bills continuing to reflect the tariff rate rather than the Interconnection Agreement rate. Other

subsequent emails complain that the credit for the Interconnection Agreement (promotional circuits) rate was initially retroactively applied only to the three original circuits. (As part of putting the DS1 promotional circuit issue behind it, GRC ultimately agreed to extend the retroactive credit to six additional circuits.) What BitWise characterizes as confusion and miscommunication by GRC is no more than BitWise refusing to understand and comply with the terms to which it had agreed.

BitWise also characterizes several email exchanges as statements by different representatives of GRC that BitWise was current or would be current if certain payments were made. Most of these statements assert no more than that BitWise's account would temporarily unfrozen from a new Orders processing hold (specified as the "duty to perform" in the Interconnection Agreement) if some substantial payment was made. They are neither formal nor informal statements that BitWise was current.

Contrary to the direct statement of BitWise's counsel in the May 30 meeting that BitWise always paid the undisputed portions of its bills, both the Spreadsheet and the email clearly demonstrate that BitWise frequently and consciously declined entirely to pay a bill on the basis of some question about some part of it, which is contrary to the dispute procedures under the Interconnection Agreement. Section 8.3 of the Interconnection Agreement states:

If any portion of an amount billed by a Party under this Agreement is subject to a good faith dispute between the Parties, the billed Party shall give notice to the billing Party of the amounts it disputes ("Disputed Amounts"), within ninety (90) days of the billing date and include in such notice the specific details and reasons for disputing each item. . . . The billed Party shall pay by the Due Date all undisputed amounts.

Even putting aside whether BitWise met the technical conditions of the Interconnection Agreement in putting any amounts in dispute, BitWise frequently contradicted the substantive requirement of the Interconnection Agreement to pay all undisputed amounts. For example, in the BitWise Spreadsheet:

- Cell I4 indicates that BitWise refused to pay until a month after the due date any amount on a circuit invoice because it lacked information about which circuits the invoice affected. No question was raised that some circuit money was due.
- Cell I7 states that BitWise withheld substantially all payments on a March 2005 bill until May of 2005, nearly thirty days after an adjusted invoice was issued.
- Cell I14 explains that, because BitWise did not get a "corrected" invoice (presumably corrected to reflect the interconnection agreement price for the DS1s) in November or December of 2006, it did not make any payments in those months, despite referencing an informal suggestion from GRC that it pay at least \$8,000 as partial payment. Of course, the delay in issuing "corrected" invoices was fully consistent with Fred Miri's written

explanation to BitWise in September that no correction could issue until after Commission approval of the Interconnection Agreement.⁴

- Cell I15 indicates that an \$8,000 payment was made on an "undisputed" element of an invoice, but that it was not made until a month and a half after the invoice issued.
- Cell I20 flatly states that no payment was made for undisputed amounts because it would not impact the order suspension status.

BitWise's motivation for initiating these disputes and its (apparent) tenuous financial capacity is exemplified by the email exchange between "eric@omnilec" and Mike Schuler from Thursday May 10 under the statement "What GR owes us." After eric@omnilec characterizes what BitWise owes GRC and what GRC purportedly owes to BitWise for reciprocal compensation,⁵ Mr. Schuler concludes:

So we [BitWise] owe them [GRC] no more than \$6K at best. We have misplaced their current bill but as soon as we locate it we will figure out the 100% accurate undisputed amount and see if we can swing paying them the ~\$6K today (not likely). I will put the interest charges in dispute in a few min. and CC on what I sent.

This statement demonstrates not only BitWise's scheme to short pay GRC, it shows that BitWise is only marginally able at best (and perhaps unable) to pay its vendors on a current basis. That is why BitWise is in continual arrears and situations such as this are why Section 5.2 and 5.3 of the Interconnection Agreement enables GRC to demand an assurance of payment. GRC should not be obligated to be BitWise's short term banker every month and GRC cannot afford to become BitWise's bankruptcy creditor if BitWise's marginal business case becomes an untenable business case. (Under the current circumstances, the Commission might also ask whether BitWise remains financially capable of providing local exchange service as asserted in its certificate case.)

GRC's demand for an assurance of payment is not only consistent with the Interconnection Agreement, it is a reasonable business response to a demonstrably weak customer, as demonstrated by the facts herein. BitWise is not being asked to submit \$22,000 to GRC, but to obtain a letter of credit from a reputable bank of BitWise's choice. While there may be an interest expense to BitWise related to its creditworthiness and a collateral requirement, it is difficult to see why GRC should shoulder a credit risk at no charge, that may be too risky for a commercial bank to accept for a reasonable fee.

⁴ GRC cannot manually bill its customers. Changes to the billing system required a signed and ICC approved agreement, which indicate an "approved" rate.

⁵ It is worth noting that the Interconnection Agreement does *not* specifically provide for offsets. However, assuming, for the sake of comparison, the validity of the reciprocal compensation billing, BitWise still owed GRC far more than the estimated "~6K."

Impact of Termination on Service to Customers

Because of GRC's desire to make the transition as seamlessly as possible and because the Commission staff has indicated a reasonable concern for the impact of termination of the Interconnection Agreement for Default, on the customers of BitWise, GRC wishes to explain what it understands to be the timing and procedural impacts of the proposed termination. Specifically, GRC will terminate the Agreement on June 25, but it will not cut off service to BitWise on that date.

According to section 11 of the Agreement (emphasis added):

If either Party ("Defaulting Party") fails to make a payment required by this Agreement (including, but not limited to, any payment required by Section 8.3 of undisputed amounts to the billing Party) or materially breaches any other material provision of this Agreement, and such failure or breach continues unabated, uncured and undisputed for thirty (30) days after written notice thereof from the other Party, the other Party may, by written notice to the Defaulting Party, (a) suspend the provision of any or all Services hereunder, or (b) cancel this Agreement and terminate the provision of all Services hereunder. *GRC shall notify the Commission of an impending discontinuance and will assist affected customers with finding new carriers consistent with its duties under Illinois law.*

While BitWise has arguably cured part of its Default regarding its current payment, it has not cured its default regarding assurance of payment. Under the Agreement, GRC could terminate service on June 25, but does not wish to do so based on its concern for the customers of BitWise. Therefore, in lieu of termination for Default, GRC is willing to treat the termination as a request to negotiate a new interconnection agreement. Therefore, so long as BitWise remains current on its invoices, GRC will continue to provide service under the current Interconnection Agreement until (a) a new Interconnection Agreement is approved (whether as a result of negotiation or arbitration); (b) the 160 days for negotiation expires without a request for arbitration; or (c) an arbitration, though commenced, is terminated through abandonment or the conclusion of all appeal rights. If it becomes apparent that termination of service is imminent, GRC will cooperate with either BitWise or the Commission Staff to see that each BitWise customer receives notice of the termination of service and has ample opportunity to transition to the local service provider of the customer's choice. Also, GRC is willing to wait for a period not to exceed 60 days before evaluating BitWise's payment history under a new agreement as a part of a "fresh start." However, even in the fresh start notion, GRC wants to specify that it will not delay in invoking the deposit requirement to BitWise should it falter in making timely payment.

Attachments

As discussed above, GRC is attaching its responsive spreadsheet.

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GRC is also attaching four AT&T Illinois tandem summary reports referenced in footnote 2 above.

GRC will shortly be forwarding copies of the bills it generated to BitWise from September 2006 through April 2007 as requested by Commission Staff on May 30. GRC can provide additional bills if the Commission requests.

* * *

GRC would be happy to provide additional information at the request of Commission Staff or to discuss this memorandum with the Staff and BitWise.